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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JESS ALBERT JAMES GIGER, JR., Defendant and Appellant.	C083347 (Super. Ct. No. 16CF00782)

THE APPEAL

A jury found defendant Jess Albert James Giger, Jr., guilty of two counts of assault. On appeal, defendant contends the trial court erred in denying his request to impeach the victim with the victim's conviction for violating Fish and Game Code section 3004. He also contends the trial court erred in imposing consecutive terms without stating reasons and that, if his counsel failed to object to the trial court's decision without stating its reasons, he received ineffective assistance of counsel. Because (1)

Fish and Game Code section 3004 is not a conviction evidencing moral turpitude, (2) defendant has forfeited his claim that the trial court erred by not stating its reasons expressly for imposing consecutive sentences, and (3) defendant did not receive ineffective assistance of counsel because he has not shown prejudice from his attorney's failure to object to the lack of an express statement of reasons by the trial court for its sentence, we affirm the judgment.

FACTS

The victim was a uniformed security guard, patrolling near a pizza restaurant in the afternoon. He saw two men sleeping on a nearby hill and asked them to move. They said okay.

The victim returned to his rounds, but when he came back, the two men were again sleeping on the hill. The victim again asked them to leave. One of the loiterers said he was just sneaking in a nap but would leave. Ten minutes later, the men still had not left. The victim told them it was time to go.

At that point, defendant arrived on his bike and rode between the victim and the two men, staring at the victim as he left. When defendant returned, he yelled to the two men that they did not have to listen to the victim, who was not a security guard.

The victim approached defendant and defendant said, "Oh, man, I'm just looking out for their best interest. I just wanted them to have a chance. I didn't want you to send them to jail." The victim tried to take defendant's picture, but defendant pushed the phone away as the victim held it up.

Defendant then punched the victim in the temple. The victim wrestled defendant to the ground and tried to pin him down. Defendant had his bike in front of him, and as the two struggled on the ground, the bike stayed between them. During the struggle, the victim held down a button on his phone to dial 911.

At some point, the victim saw defendant had a silver multi-tool in his hand. Defendant was wielding it like a knife and tried to stab the victim with it. The victim received stab marks on his boot and bruises on his foot.

After he saw the tool, the victim stood up. At some point, he was able to take the tool from defendant and throw it toward a nearby building. Defendant then sat on the ground as though he was out of energy.

The victim turned his back and talked with the 911 operator. He then heard the two loiterers say, "No, no, don't do it." The victim turned to see defendant wielding the chain from his bike and a bike seat.

Defendant swung the chain at the victim's face. The victim blocked with his arm, leaving a welt and swelling that took several weeks to heal.

The victim saw another security guard and hollered and waved. Seeing the other security guard, defendant put his chain and seat back on his bike and rode off. After he was arrested, the victim identified defendant to the police. When he did, defendant asked, "Are you even a fucking security guard?"

LEGAL PROCEEDINGS

A jury found defendant guilty of two counts of assault with a deadly weapon (Pen. Code., § 245, subd. (a)(1)), one for the attack with the multi-tool, and one for the attack with the bike chain. The court imposed a five-year aggregate term: a four-year upper term for one assault count (Count I), a one-year (one-third the middle term) consecutive term for the other count (Count II), and a concurrent one-year term for a misdemeanor vandalism count defendant had pleaded to.

DISCUSSION

I

Victim Impeachment

On appeal, defendant argues the trial court committed error when the court refused to allow him to impeach the victim with a prior criminal offense.

A. Background

During trial defendant asked to be allowed to impeach the victim with a prior misdemeanor conviction, that is, a conviction for firing a gun in the proximity of an occupied building in violation of Fish and Game Code section 3004.

In pertinent part, Fish and Game Code section 3004 provides: "It is unlawful for a person, . . . while within 150 yards of an occupied dwelling house, residence, or other building, . . . to either hunt or discharge a firearm or other deadly weapon while hunting. The 150-yard area is a 'safety zone.' "

Defense counsel argued the offense was analogous to a conviction for discharging a firearm in a grossly negligent manner (Pen. Code, § 246.3, subd. (a)), which is a crime of moral turpitude. He noted the victim had originally been charged with that section but had pleaded to Fish and Game Code section 3004. He argued the two statutes involve the same risk.

The trial court asked whether the conviction should be excluded under Evidence Code section 352 (statutory section references that follow are to the Evidence Code unless otherwise stated) and allowed the parties to brief the issue.

Defense counsel submitted a brief stating the victim had been hunting rabbits and birds with his brother, without a license, when he fired a gun in close proximity to a neighbor's home and the bullet broke a sliding glass door. Defense counsel argued the victim had engaged in grossly negligent conduct analogous to that seen in cases finding shooting into an inhabited dwelling to be an offense of moral turpitude.

The court excluded the evidence under section 352, finding its probative value was outweighed by its prejudicial effect with respect to confusing the issues. The court also noted the age of the prior conviction (he was convicted in 2008, eight years before the trial), the trial was in 2016.

B. Analysis

On appeal, defendant asserts excluding the evidence under section 352 was an abuse of discretion. He argues the prior conviction was a crime of moral turpitude, reasoning it is similar to a crime of moral turpitude, namely, grossly negligent discharge of a firearm and discharging a firearm at an inhabited dwelling. He adds, the crime was only eight and a half years old, and there was no substantial danger of the jury confusing the issues. He maintains the ruling violated his right to present a defense and confront and cross-examine adverse witnesses.

A misdemeanor conviction involving moral turpitude is admissible to impeach a witness in a criminal trial. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.)

Here, denying the request to impeach was proper because a Fish and Game Code section 3004 violation is not a crime of moral turpitude. "Moral turpitude" is the " 'general readiness to do evil.' " (*People v. Castro* (1985) 38 Cal.3d 301, 315.) Whether a conviction involves moral turpitude turns on whether one can reasonably infer a general readiness to do evil from the " ' "least adjudicated elements" ' " of the offense. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 458.) The facts of the actual violation are not considered. (*Ibid*.)

A general readiness to do evil cannot be inferred from the least adjudicated elements of a Fish and Game Code section 3004 violation. The plain language of the statute indicates all that is required is being within 150 yards of certain structures while hunting or discharging a firearm or other deadly weapon. Any number of mistakes of minimal culpability could run afoul of that statute, including simply not knowing that

structures set forth in Fish and Game Code section 3004 are within 150 yards of the weapon as it is fired or not knowing that nearby structures were occupied. Thus, it is not a crime that involves a readiness to do evil and not a crime of moral turpitude.

While Penal Code section 246.3 also is a general intent crime, a violation of that statute requires that the defendant negligently discharged a firearm *in a manner that could result in death or serious bodily injury* and, thus, a crime involving immoral conduct. Accordingly, the victim's prior Fish and Game Code misdemeanor conviction was not a crime of moral turpitude. For that reason, precluding impeachment of the victim with that conviction was not error.

II

Defendant's Challenge to the Consecutive Sentence is Forfeited

Defendant next contends the trial court erred in imposing consecutive terms without stating reasons.

A. Background

Prior to sentencing, the probation department prepared a probation report. The report recommended a four-year upper term for the first assault count, a consecutive one-year term (one-third the middle) for the other assault count, and a concurrent term for the misdemeanor.

At sentencing, the trial court noted it had read and considered the probation report and was inclined to follow the recommendation. Defense counsel argued for probation, noting defendant had been diagnosed with intermittent explosive disorder.

The trial court ultimately imposed the recommended term. It did not expressly state its reasons during the sentencing hearing for imposing consecutive terms.

B. Analysis

Defendant contends the trial court erred in imposing consecutive terms without stating reasons. While acknowledging his trial counsel never objected to the failure to state reasons, he maintains his challenge is cognizable on appeal because he had no meaningful opportunity to object prior to the imposition of sentence.

Claims involving a trial court's failure to state reasons when making discretionary sentencing choices are subject to forfeiture. (*People v. Boyce* (2014) 59 Cal.4th 672, 730-731; *People v. Scott* (1994) 9 Cal.4th 331, 356) so long as the parties had a "meaningful opportunity to object." (*Scott*, at p. 356.) Parties have such an opportunity if, at any time during sentencing, the trial court describes the sentence it intends to impose and the reasons for it, and the court then considers the parties' objections before the actual sentencing. (*Boyce*, at p. 731.) " 'The court need not expressly describe its proposed sentence as "tentative" so long as it demonstrates a willingness to consider such objections . . . . [¶] It is only if the trial court fails to give the parties any meaningful opportunity to object that the *Scott* rule becomes inapplicable.' " (*Ibid*.)

Here, the parties had a meaningful opportunity to object. The probation report sets forth its sentencing recommendation based on the matters set forth in the probation report—a recommendation that the trial court followed—that defendant be sentenced to five years in state prison, that is, four years on count I and one year on count II, thus necessarily requiring count II to be served consecutive to count I. At the outset of the sentencing hearing, the trial court advised the parties it was "inclined" to follow the recommended sentence stating also that "I'll certainly hear from counsel." Counsel made their sentencing arguments thereafter.

Defendant argues that it was only after the parties submitted the matter for sentencing that the trial court imposed the consecutive term. But that ignores the fact the trial court previously indicated it was inclined to follow the recommendation, which

included consecutive terms, and counsel thus had an opportunity to argue for concurrent terms.

Because the parties had a meaningful opportunity to object to consecutive terms, the defendant's argument that the trial court erred by its failure to expressly state its reasons for imposing consecutive sentences forfeits the claim on appeal. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 751.)

Anticipating that conclusion, defendant argues his trial counsel rendered ineffective assistance in failing to object. But even assuming arguendo the failure to object constituted ineffective assistance, defendant cannot establish prejudice. (See *People v. Maury* (2003) 30 Cal.4th 342, 389 [to establish prejudice for purposes of a claim of ineffective assistance, "the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' "].)

The record overwhelmingly supported consecutive terms. Defendant tried to stab the victim while they were wresting on the ground—after defendant started the fight by punching the victim in the head. The victim then got off defendant and turned his back to defendant to speak on the phone—plainly indicating the fight was over. Defendant, nevertheless, chose to reengage by swinging a chain at the victim's head. And but for the loiterers alerting the victim, defendant might well have seriously injured the victim. On this record, it is not reasonably probable that a more favorable outcome would have resulted had defense counsel requested a statement of reasons.

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

ROBIE, J.

RENNER, J.